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The First on the Flight Home: The Sad Story of State Aid Control in the Brexit Age

Andrea Biondi*

1. From Port Talbot ...

Very few specific areas of European law have been singled out in the debate on the benefits and costs of the UK's continued membership of the European Union. Certainly the focus has included: free movement of persons and citizenship rights; the doctrine of supremacy; the ever-expanding jurisdiction of the Court of Justice of the European Union; the UK-EU budget rules *ca va san dire*; and a few others. However, only one has had the, dubious, privilege of being identified by both Leave and Remain camps as the most unpleasant for our country: state aid law. In the run up to the referendum, it was to be expected that any news would automatically be linked to the debate on whether the UK should Leave or Remain. In March 2016, Tata Steel announced its intention to sell the entire Strip Products division of its UK steel business, in particular its biggest plant located in Port Talbot in Wales. The decision had profound implications and repercussions both locally, as the Port Talbot plant was, and still is, the focus of the community and local economy, and nationally, for the British steel industry. However the pivotal point of the debate was not the deficiency of Tata's management, or the lack of investment in new technology, or China's competitive price policy, or even potential buyers. The focus was on the fact that EU law, specifically state aid rules, would be responsible in the event of the plant closing. On the 23rd of June, 57% of voters in Neath Port Talbot voted Leave.

In the aftermath of the referendum, the state aid 'factor' of the Brexit debate continued, and again a consensus within the entire political spectrum seemed to emerge. At the Conservative conference held in Birmingham on 2-5 October, the current Secretary of State for Business, Energy and Industrial Strategy, Greg Clark, stated that one of the advantages of Brexit was that the UK government would be free from EU state aid rules which prevent Member State governments from supporting businesses. *'Clearly the state aid rule question and that thicket of questions is always there, and I hope that one of the freedoms that will come from Brexit will be that we will be able to determine our own view on that rather than complying with others ... It is something that is a constraint, clearly a bureaucratic constraint ... The ability to look at that again as part of our negotiations seems entirely reasonable.'*¹

Furthermore, on 19 October, the Chancellor of the Exchequer stated that after Brexit the UK can finally free itself of the "constraints" of the EU regime that polices illegal subsidies. He also added that, *'we would want instead a regime that allowed us to intervene appropriately but constrained us from intervening inappropriately,'*² which is obviously a very sophisticated concept. At the other

* Professor of EU Law, Centre of European Law, King's College London.

¹ <https://www1.dehavilland.co.uk/insight-blog-uk/close-on-conservative-party-conference>.

² L.Crofts, 'UK to break from EU constraints after Brexit Hammond says', in *Mlex*, 19 Oct 2016.

end of the political spectrum, Mr Corbyn, Leader of the Opposition, argued last September that Brexit could encourage a new approach to enforcing free market rules. Essentially, this would mean that, *'any deal with the EU must recognize that the old state aid rules are no longer valid. When governments across the world are intervening, it makes no sense to tie a government's hands here'*.³ In response to a specific question on the matter, he apparently later explained that he was not suggesting that Britain should reject a post-Brexit trade deal with the EU if it involved accepting state aid rules, rather, he just wanted Britain to be able to adopt a flexible approach to state aid, as Germany, France and Italy appear permitted to do. Yet another sophisticated concept. The Shadow Chancellor, Mr McDonnell, explained the Labour Party strategy further, on a radio programme. He emphasized that the party wanted all businesses to have "access" to the single market, but was not prepared to support some aspects such as state aid rules,⁴ subsequently creating expectations that generations of trade lawyers will suddenly learn how to square the circle. It appears pretty clear that despite the many deep divisions in the post referendum era, we have at least one certainty: state aid is the first on the plane home. Still, like in the films where everything happens just when the hero or heroine is already boarding the fatal plane, let's make a final plea before bidding farewell to such an old friend, or at least acquaintance.⁵

A Case of Mistaken Identity

One of the main criticisms directed at state aid control, is that it is an interference in the legitimate policy making powers of a nation state. The political right claim that it prevents deregulation, the cutting of red tape and liberalization. The political left claim that it is an irritant frustrating various social policies and reducing the possibility of pursuing welfare related goals. Funny how things change, and how easy is to forget. Let's start from the right and then move to the left.

State aid rules have existed since the very beginning of the process of European legal integration. As a first in the history of trade law, they appeared initially in Article 4(c) of the Treaty constituting the European Coal and Steel Community, prohibiting any *'subsidies or state assistance, or special charges imposed by the state, in any form whatsoever'*. Such a robust stance was confirmed and enhanced in the Treaty of Rome, which expanded on this prohibition well beyond coal and steel customs duties. The structure of the Treaty has remained essentially the same since 1957. What is now Article 107 (1) contains, at least in comparison with those days, an amazingly strong precept that *'any aid granted by a Member State or through State resources in any form whatsoever which distorts or*

³ <https://www.theguardian.com/politics/2016/sep/07/jeremy-corbyn-says-uk-should-reject-key-aspects-of-single-market-after-brexite>.

⁴ <https://www.theguardian.com/politics/2016/oct/27/tories-want-bankers-brexite-deal-john-mcdonnell-labour>.

⁵ Some of the ideas expressed here are also contained in A Biondi 'State Aid, government spending and the virtue of loyalty' in P. Birkinshaw & A. Biondi (eds.) *'Britain Alone?'* Kluwer, 2016, 291. For a little less idealistic view of state aid rules see N. Zahariadis, 'Winners and Losers in EU State Aid Policy', in *Journal of Industry Competition and Trade* (2013) 13, 141.

threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'. The Treaty, in its Article equivalent to what is now Article 108 TFEU, also transferred the 'sureveillance' of such a provision to a supranational referee, the European Commission. 'Amazing' is probably the right word, considering that the six founding Member States' economic (and industrial) policies were largely led, if not directly controlled, by national governments. State aid control was therefore inserted as an essential tool to fight protectionism and promote cooperation between what remained six very isolated entities, in terms of market openness. The government driven industrial model of those states and the various economic crises, certainly contributed to a very slow start to the application of state aid rules. As is well documented,⁶ it was only in the mid-eighties, with the emphasis being on the achievement of the internal market, generally influenced by neo-liberalism becoming policy, that the European institutions started to take state aid rules seriously. Paradoxically, mostly due to Anglo-Saxon and Celtic influence.

In 1985, the Irish Peter Sutherland was appointed Commissioner for Competition, followed by the British Leon Brittan in 1989. Under both their tenures, the Commission pursued a much more robust state aid policy. For instance, it 'created' and developed a new remedy. With the backing of the European Court of Justice,⁷ the European Commission started requiring the 'guilty' Member State to take all necessary measures to recover the aid from the beneficiary, in the case of unlawfully granted State aid.⁸ The obligation on Member States was identified as a duty to recover the sums owed in order to eliminate the distortion of competition caused by the competitive advantage procured by the unlawful aid. The 'rationale' behind such obligation was also a desire to put pressure on Member States to comply with the rules with at least some form of sanction eventually introduced. There is also a second function to recovery actions, which is sometimes overlooked: ensuring the equality of Member States before the law. In other words, and more explicitly, recovery actions, with all their imperfections, are aimed at reassuring the virtuous Member States that the other States which are more casual with public money will be punished for their profligacy.

Naming and Shaming tactics may be primitive, but they alert investors, deter potentially unworthy beneficiaries and increase market transparency. Moreover, *bona pace* Corbyn, the usual suspects of France, Germany, Spain, Portugal and Italy also paid rather a lot of money into the EU coffers for repeated violations of state aid rules because the Court of Justice condemned them all to pay lump

⁶ See M Merola, 'The Forces Shaping State Aid Control in the EU', in L. Rubini & J. Hawkins (eds) *'What Shapes the Law? Reflections on the History, Law, Politics and Economics of International and European Subsidy Disciplines'*- e-book, EUI-University of Birmingham, 2016, 101.

⁷ See for instance Case C -52/84 *Commission v Belgium* [1986] ECR 89.

⁸ The specific rules on the action for recovery are now codified in Article 14(1) of the Procedural Regulation of 2013 [OJ L 204 of 31.07.2013, p. 15 amending Council Regulation (EC) No 659/1999, 1. See also in general E. Righini, 'Godot is here: recovery as an effective State aid remedy', in Liber amicorum Francisco Santaolalla Gadea, *EC State Aid Law*, Kluwer Law International, 2008, 200.

sums and penalties under the specific procedure provided for by Article 260 TEFU, as a consequence of the non compliance with judgments requiring the recovery of aid.⁹

In the mid-eighties and, in particular under Commissioner Brittan, state aid 'rationale' also started to change. The emphasis was increasingly placed on the idea that state aid rules had to be considered an essential tool to guarantee the 'equality', not only of Member States, but of the market place as well. State aid rules were then perceived as essential in preventing the waste of public resources on policies or on undertakings that the market would never support. The inherent link between state aid and competition rules was therefore increasingly strengthened. And these were the years in which the Commission – with the support of the Court took aim against traditional industrial policy makers such as French banks,¹⁰ and gigantic Italian public holding companies, including *IRI*.¹¹ This tendency has been confirmed over the years and has arguably experienced some moments even of excessive enthusiasm, whereby state aid was nearly replaced with an antitrust approach with efficiency as the ultimate goal. State aid rules were therefore to be used to prevent inefficient undertakings surviving artificially in a competitive market, to the detriment of more efficient operators.¹²

Without reaching this extreme, the current system is firmly based on the idea that national policies, which are pro-business, should never fall foul of state aid rules. For instance, in the recent Notice on the notion of State Aid, the Commission reiterated that in determining whether or not an element of aid can be detected, national economic policies will be tested on whether the State has granted an advantage to an undertaking by not acting like a market economy operator with regard to a certain transaction. The Notice clarifies that, *'it is not relevant whether the intervention constitutes a rational means for the public bodies to pursue public policy (for example employment) considerations. Similarly, the profitability or unprofitability of the beneficiary is not in itself a decisive indicator for establishing whether or not the economic transaction in question is in line with market conditions. The decisive element is whether the public bodies acted, as a market economy operator would have done in a similar situation. If this is not the case, the beneficiary undertaking has received an economic advantage which it would not have obtained under normal market conditions, placing it in a more favourable position compared to that of its competitors.'*¹³ Such a pro-business approach is also reinforced by a further new development gradually emerging in the years of economic and financial crises: the Modernization of State Aid. As the last grand plan elaborated by Commissioner Almunia, it is based on the idea that the State should be freed from state aid control if engaged in

⁹For some statistics see Biondi, *State Aid Control, Government Spending and the Virtue of Loyalty*, cit. above.

¹⁰ Case C-290/83 *Commission v France* [1985] ECR I-445.

¹¹ Case C-305/89 *Commission v Italy* [1991] ECR I-01603.

¹² SAAP, State Aid Action Plan, see further T. Kleiner, "The State Aid Action Plan", in W. Mederer., N. Pesaresi, M. Van Hoof (eds), *EU Competition Law, State Aid* (2008) Claey's & Casteels, Volume IV, Book I, p. 65.

¹³ C-2016 Commission Notice on the notion of Aid ex Art 107 (1) TFEU OJ C 262, 19.07.2016, p.18.

promoting 'worthy' objectives.¹⁴ It advocates that public spending should become more efficient, effective and targeted at growth-promoting policies that fulfil common European objectives. From research and development and innovation, to risk capital, broadband, regional aid, aviation, energy and the environment, all are worthy for States to feel free to invest.¹⁵ Let's take the example of the energy market, which has, despite many efforts, been essentially waterproof from any form of antitrust enforcement. The Commission simply acknowledged that government support, including support to facilitate the drive towards renewable energy sources, is unavoidable. It adopted the Energy and Environmental State Aid Guidelines, which provides significant opportunities to the State to play the role of entrepreneur, and only inserted some mild market-friendly rules, such as requiring Member States to grant aid only through a competitive bidding process from 2017.¹⁶ In short, from the perspective of deregulated markets with business incentives, state aid rules should be seen as non-problematic.

Let's now move to the left, where rules controlling state aid can prevent socially responsible policies. This is a view that gives a very partial and incomplete account of the complexity of the system. First of all, state aid control rules are consistent with the constitutional settlement embodied by the Treaty of Rome. The model sketched in the original European Treaties was certainly based on a perhaps naïve and optimistic attempt to devise an efficient but fair supranational social market economy model, with its checks and balances between the promotion of economically virtuous policies and the preservation of certain core national welfare values. Nonetheless, the basic provisions of the Treaty were not, and still are not, neutral. They are clearly based on the imperative of promoting '*steady steady expansion, balanced trade and fair competition*'.¹⁷ A particular strident cause for conflicts has therefore always been the mismatch between the considerable powers vested in the EU, as the supranational actor, to impose on its Member States, strict market rules unaccompanied by equally effective instruments apt to promote social values.¹⁸

However, even in this context, state aid rules are paradoxically, the least problematic. First, the Treaty itself offers a wide array of possibilities. Article 107(2) contains a series of grounds that automatically render the aid compatible with EU law, while paragraph (3) lists a series of grounds that could make the aid compatible. Consequently, it is abundantly possible for Member States to show that even measures that involve a degree of selective financial support are however fully justified in pursuance of the general interest. The Commission

¹⁴Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2012) 209 Final, 8 May 2012.

¹⁵ For a list of the measures adopted so far see www.ec.europa.eu/competition/state_aid/modernisation/index_.

¹⁶ Communication 2014/C 200/01 – Guidelines on State aid for environmental protection and energy OJ C 200, 28.6.2014, p. 1–55.

¹⁷ EEC Treaty Preamble.

¹⁸ The literature on these issues is immense. For an overview of some of the issues see D. Damjanovic 'The EU market rule as Social Market Rules: Why the EU can be a Social Market Economy' in (2013) 50 CMLRev, 1685.

decisional practice reflects this and it would be enough to point to the, admittedly flawed but still vital, regional funds system, or the entire employment related state aid policy, where invariably support has been lent to Member States in order to protect regional solidarity¹⁹ and to combat unemployment or favour youth employment.²⁰ Over the years, the Commission has also approved innumerable rescue and restructuring plans, acknowledging the positive impact of such aid.²¹

The Court of Justice, usually so reluctant to draw any boundaries as to the application of EU law which relates to areas of national regulatory competence, is instead particularly restrained when dealing with the application of state aid rules to national social policies. It famously excluded, in the *Altmark* judgment, the application of state aid rules when state support can be considered as compensation for the performance of a public service obligation.²² This case law incidentally provided the European Commission with some kind of legal basis for adopting a series of measures that *ex ante* exclude the applicability of state aid rules to social services.²³ Even outside the area of universal public services obligations, social policy considerations have usually received much more attention than under classic free movement provisions, for example.²⁴ The Court of Justice famously found in a trio of labour law cases that legislative provisions legislations adopted for social and employment purposes could not be considered to constitute State aid.²⁵ Recently, the General Court had to decide whether additional redundancy payments, which were included in the costs to be incurred in the event of company liquidation, amounted to state aid.²⁶ The Court found that, '*in a social market economy, a reasonable private investor would not disregard ... the development of the social, economic and environmental context in which it continues to develop ... The long-term economic rationale of a*

¹⁹ See M Merola, 'Regional aid: recent trends and some historical background', in *Eur. State Aid Law Q.* 9(3), (2010) 589.

²⁰ L. Tebano, 'State Aid for Employment after the New General Block Exemption Regulation', in *Eur. State Aid Law Q.* 14 (2015), 241

²¹ See the statistics reported at <http://www.oxera.com/Latest-Thinking/Agenda/2016/Brexit-implications-for-state-aid-rules.aspx>. Oxera calculated that, employment generally falls by around 30% whereas output falls by almost 20% over the three years post-distress. Oxera 'Should aid be granted to firms in difficulty? A study on counterfactual scenarios to restructuring state aid', prepared for the European Commission, December, 2009. Another study is quoted telling us that on regional assistance programmes in the UK found that a 10% increase in state subsidies led to a 7% increase in manufacturing employment in the region where the aid was granted Criscuolo, C., Martin, R., Overman, H. and Van Reenen, J. (2012), 'The Causal Effects of an Industrial Policy', National Bureau of Economic Research.

²² Case C-280/00, *Altmark Trans and Regierungspräsidium Magdeburg* (*Altmark*), ECLI:EU:C2003:415,

²³ http://ec.europa.eu/competition/state_aid/overview/public_services_en.html.

²⁴ Cfr Case C-438/05 *Viking Line Abp*, [2007] ECR I- 10779.

²⁵ Joined Cases C-72/91 and C-73/91, *Sloman Neptun* [1993] ECR I-887; Joined Cases C-52/97, C-53/97 Case C-189/91, *Kirsammer-Hack* [1993] ECR I-6195 and C-54/97, *Viscido* [1998] ECR I-2629.

²⁶ Case T-565/08, *Corsica Ferries France SAS v. Commission*, EU: T: 2012:415, upheld by the Court of Justice in Case C-533/12 P, *SNCM SA and French Republic v. Corsica Ferries France SA*, EU: C: 2014:2142, annotated by G Galletti, 'How Reasonable a Private Investor Can Be Assumed to Be? Corsica Ferries France', in 52 CMLRev (2015) 1095.

reasonable private entrepreneur's conduct cannot therefore be assessed without taking account of such concerns'.²⁷ These employment relationship rules could and should therefore be included in the assessment as to whether a measure is to be qualified as state aid.

State Aid is Better Than it Seems

The arguments made above could be contested and turned on their head, as it is nearly impossible to scientifically define more than fifty years of law and policy development. However, I would like to argue that there is a dimension of state aid law that is very often, perhaps deliberately, neglected: transparency.

One very important facet of state aid control is that it is procedural. Member States are under an obligation under Article 108 TFEU to notify any new planned aid to the Commission, and then enter into negotiations to secure approval. The initial step is akin to pre-trial discovery when facts, documents, and depositions need to be disclosed. Even in those cases where notification is not required, Member states are still expected to be as transparent as possible. For instance, Member States are now required to publish all individual awards of aid that exceed EUR 0.5 million.²⁸

A long-held conviction, is that one of the questions of modern democracy is the opacity of the allocation of public resources. The United Kingdom, despite some propaganda on its openness, is not immune from this disease. In a truly revealing study, Prof. Farnsworth, has demonstrated the extent of this problem. Whilst there is a relatively open discussion and available data on spending on social welfare, there is vitally a sort of *omerta* when dealing with what Farnsworth calls 'the corporate welfare state', meaning all public policies that 'directly or indirectly meet the specific needs or preferences of private business.'²⁹ There are a myriad of instruments that are available, from start-up grants to tax breaks or amnesties, loans for new investments and so on. These state interventions might not necessarily be bad, but there is usually very little openness and democratic control. When attempts are made to impose scrutiny, they are usually fiercely contested.³⁰

Contrarily, state aid control is based on disclosure. As a case in point, there were, and still are, many negative repercussions from the financial crises that affected the whole of the European banking sector. In the aftermath of the first wave of banking disasters, state aid control was essentially reduced to an act of rubber stamping by the Commission, which usually took less than twenty-four hours to approve very complex rescue plans, such as Northern Rock. However, to the Commission's credit, some firm and clearer principles on how to control aid

²⁷ Case T-565/08, above, para 82.

²⁸ See Commission Regulation (EU) No 651/2014 (GBER).

²⁹ K. Farnsworth, 'Public policies for private corporations: the British corporate welfare state', *Renewal*, vol.21, 51.

³⁰ See Dame M. Hodge 'Called to Account: How Corporate Bad Behaviour and Government Waste Combine to Cost us Millions' Little, Brown Book Group (2016).

granted to banks are eventually emerging.³¹ These are, in my view, far from perfect, and in some cases simply wrong. However, notification of the support measures given to banks and their subjection to state aid control obliged Member States to be open about the support and assistance provided.

Similarly, the uproar caused by the *Apple* and other Commission tax decisions is equally revealing. In a series of investigations, the Commission found individual tax rulings granted by Ireland, Luxembourg and the Netherlands to involve State aid. This was because they provided selective advantages to a specific company or group of companies influencing the allocation of taxable profit between subsidiaries of a group located in different countries.³² The calculations used to set the tax base allegedly rely on the remuneration of a subsidiary or a branch, not on market terms, therefore providing favourable treatment to the company as compared with other taxpayers. In particular, the national tax authorities fully endorsed transfer-pricing arrangements proposed by the taxpayer himself for determining the taxable basis of an integrated group company. By agreeing to schemes that accept multinational corporations pricing their intra-group transactions in a manner that does not reflect the conditions that apply between ordinary companies, the national authorities, according to the Commission, granted an unfair competitive advantage to those multinationals. There are some specific questions as to the legality and compatibility with EU law of the Commission's decisions, which the EU Courts will assess. However, there is no doubt that these decisions prompted a very important debate on transparency and fairness of national policies. It is a basic question of national and supranational democracy: a market should not just be efficient and technologically advanced, but equal and fair, in the sense that all its operators should be taxed fairly.

4.... to Sunderland

One of the current activities of both EU and non-EU law specialists, is to imagine post-Brexit scenarios. If we engage in this activity with state aid, there are essentially two possibilities: first, an agreement which would include state aid control in some form, and second, an agreement without state aid. Many blogs have already identified how most of the possible models that have been mentioned as an alternative to EU membership in reality include state aid provisions.³³ The EEA, often mentioned, is unlikely to be considered satisfactory because it is exactly the same as membership of the EU. Article 61 of the EEA is substantially identical to Article 107, and the EFTA Court has interpreted it

³¹ Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') (OJ 2013, C 216, p. 1) partially transformed in hard law by Directive 2014/59/EU on recovery and resolution of credit institutions and investment firms ("BRRD"), OJ L 173, 12.6.2014, p. 190.

³² Ireland for Apple Sales International and of Apple Operations Europe; the Netherlands for manufacturing activities of Starbucks Manufacturing EMEA BV Luxembourg for the financing activities of Fiat Finance and Trade Luxembourg for the activities of Amazon, at http://europa.eu/rapid/press-release_IP-14-663_en.htm. The recovery decision against Apple is at http://europa.eu/rapid/press-release_IP-16-2923_en.htm

³³ See G Peretz at www.monckton.com/state-aid-post-brexit/.

consistently and in light of the case law of the European Court of Justice.³⁴ Switzerland seems to offer more hope in a life without state aid, as none of the bilateral agreements that the Confederation has with the EU mentions state aid, except: the 1972 Free Trade Agreement and the 1999 Agreement on Air Transport. Unfortunately, even Switzerland is very well aware of the possible state aid dimension of its own national policies. For instance, it has recently introduced a reform to its tax system, which is proposing to abolish arrangements for status companies under corporate tax law which is no longer acceptable under EU state aid rules.³⁵ It is also very likely that EU will insist in the insertion of some state aid rules in any kind of agreement.³⁶ The final option is to fall back on WTO rules. In this latter scenario, the provisions of the SCM agreement would be applicable. There are many similarities between the notion of subsidy and that of aid and the interpretation of the WTO appellate body has, over the years, narrowed the textual differences further.³⁷ However, unlike EU law, there is no procedure under which subsidies or other forms of state support are notified and approved by the WTO. The WTO rules apply *ex post*, once a dispute before the WTO Appellate body is opened between states, and of course no recovery of the unlawful aid can be ordered but only retaliatory measures can be taken by the victorious party. No to mention that a WTO procedure takes an infinite time.

In conclusion, one way or another it could be argued that it would be impossible for the UK to get rid of state aid control. However, my argument is different: a state aid control free model is not crime, worse, it is a mistake.³⁸ First, the absence of state aid rules would not automatically mean an increase in public spending. It is well documented that the UK grants traditional sectors significantly less support than most other EU states. The exception however, is the financial sector. Essentially State aid per capita is therefore much lower than in the rest of Europe.³⁹ It also open to debate whether –in the absence of any trade agreement - companies might end up paying more in tariffs than what they might receive in aid. Second, business and commercial operators would still seek the degree of independence and impartiality that the European Commission has so far guaranteed. Interestingly, many practitioners are already suggesting that powers should be transferred to the Competition and Markets Authority. Third, and most importantly, there are some compelling ‘constitutional’ imperatives. As the recent controversy surrounding the decision by Nissan to invest in the Sunderland plant, and the immediate rumors that a preferential deal was offered by the Government behind closed doors indicates, the lack of any control on public spending could mean a return to arbitrary and

³⁴E.g. Joined Cases E-17/10 and 6/11 *Liechtenstein and VTM Fund Management v ESA*.

³⁵ https://www.efd.admin.ch/efd/en/home/dokumentation/nsb-news_list.msg-id-64281.html

³⁶ See L Borlini, ‘State Aid Control and Subsidies Regulation in EU Agreements: Substance, Procedure and Policy Space in the ‘New Generation’ EU FTAs’, in G. Ziccardi Capaldo (ed.) *The Global Community Yearbook of International Law and Jurisprudence 2016*, OUP, 2016

³⁷ L Rubini ‘The wide and the narrow gate: benchmarking in the SCM Agreement after the *Canada – Renewable Energy/FIT* ruling’, in *World Trade Review* 14(02), 211.

³⁸ Apologies to Joseph Fouche’.

³⁹ The average amount spent by the UK on aid is approximately €90 per capita compared with €170–€240 per capita in Germany, France and Belgium. See Oxera, cit above.

protectionist industrial policy.

The state aid rules that EU law has imposed so far on the UK attempted to avoid a situation whereby the government of the day would pass legislation to favour only certain industries and invest according to their priorities. These rules are based on transparency, balancing differing interests, regulatory impact assessments and value-for-money tests, and forced the state to behave within certain pre-determined parameters. Without EU coordinated state aid policy, deals between governments and firms are up for grabs, with high income regions and big corporations in a definite position of advantage. It will also need to be so. A truly serious industrial policy does not therefore depend on the absence of state aid control but rather on reform of corporate governance in order to promote fairness, and openness. These are criteria which reward companies that add social value, location policies aimed at improving the distribution of trade and investment and decisions that preserve regional solidarity. So stop that plane, it is leaving without state aid!